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CHARLES ELMORE CRO

Supreme Court of the United States

OCTOBER TERM, 1935

No. 26

GEORGE W. McCANDLESS, as Receiver of DUQUESNE GAS CORPORATION,

Petitioner,

vs.

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER GEORGE W. McCANDLESS AS RECEIVER OF DUQUESNE GAS CORPORATION

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Of Counsel.

September, 1935.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER GEORGE W. McCANDLESS AS RECEIVER OF DUQUESNE GAS CORPORATION

This case comes before the Court on writ of certiorari granted to the United States Circuit Court of Appeals for the Second Circuit, on the 13th day of May 1935 (79 L. Ed. 841).

The suit was brought in the District Court of the United States for the Southern District of New York where a decree was rendered on May 11, 1933, awarding a judgment to the plaintiff in the sum of $1,834,640.08 (R. 233). Said decree was reversed by the judgment of the Circuit Court of Appeals for the Second Circuit filed January 15, 1934 (R. 256) on the ground that the appoint-

ment of the plaintiff as ancillary receiver was void and he therefore did not have capacity to sue.

The Supreme Court granted a writ of certiorari on April 30, 1934 (78 L. Ed. 863) limited, however, to the question of the validity of the appointment of the plaintiff as ancillary receiver, and upon the appeal pursuant to such writ the Supreme Court reversed said judgment of the Court of Appeals, dated January 15, 1934, and remanded the case to the Court of Appeals for reargument and for the determination of the questions relating to the liability of the defendants decided by the District Court and presented by the appeal and cross-appeal (79 L. Ed. 32).*

Upon the rehearing pursuant to the mandate of the Supreme Court, the Circuit Court of Appeals rendered a judgment, dated March 11, 1935, reversing the judgment of the District Court on the whole case (R. 273). The writ of certiorari granted by the Supreme Court on May 13, 1935, brings up for review this last mentioned determination of the Court of Appeals.

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*The opinion of the Circuit Court of Appeals, by Manton, Circuit Judge, upon the rehearing erroneously states in the second paragraph thereof (R. 262):

> "A receiver was appointed for the Duquesne Gas Corporation in the United States District Court for the Western District of Pennsylvania, and he sued in the District Court for the Southern District of New York, without appointment therein as an ancillary receiver. We reversed the decree, on a former appeal, for failure to have an ancillary receiver appointed in the Southern District of New York before suit (68 Fed. 2, 925). The Supreme Court reversed (79 Law Ed. 32) remanding the cause to this court to pass upon the merits of the issues presented."

The opinion of the Supreme Court (79 L. Ed. 32) put the reversal upon the ground that the validity of the appointment of the plaintiff as ancillary receiver could not be raised for the first time upon appeal. The Supreme Court was far from deciding that a foreign equity receiver can sue.

PREVIOUS OPINION OF THIS COURT AND OPINIONS BELOW

The opinion of the District Court is printed at page 218 of the record, and is reported in 4 Fed. (2d) 884 (Advance Sheets only). The opinion of the Court of Appeals on the first reversal is printed at page 251 of the record and is reported at 68 Fed. (2d) 925. The opinion of the Court of Appeals upon the second reversal is printed at page 261 of the record and is reported at 75 Fed. (2d) 977. The previous opinion of this Court is reported at 79 L. Ed. 32, 293 U. S. 67.

JURISDICTION

Jurisdiction arises from the granting of the writ of certiorari herein pursuant to Section 240 (A) of the Judicial Code as amended by the Act of 1925.

STATEMENT

We will divide the statement into three parts, (1) the actual facts, (2) the fictitious corporate records, and (3) the treatment of the facts by the Court of Appeals.

The Actual Facts

The subject matter of the suit is the promoting in 1930 by the defendant Maxime H. Furlaud and his associate Carlos Reuter (the latter was named as a defendant but not served with process) of the Duquesne Gas Corporation, of which the plaintiff is the ancillary receiver, and the public issue by defendants of $4,000,000 of bonds and $1,000,000 of notes of said corporation and the sale by them of a part of the stock of said corporation for $850,000.

The facts as found by the District Judge* and which (except as to one detail) are undisputed are, very briefly stated, as follows:

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*The opinion of the District Judge is printed at pages 218-232 of the record.

Furlaud and Reuter acted through an incorporated banking house, known as Furlaud & Company (R. 219) which corporation after changing its name was dissolved before the commencement of this suit (R. 229, 109). They caused their banking house to publicly circulate prospectuses covering the issue of the $4,000,000 of bonds and the $1,000,000 of notes, which stated in effect that the proceeds of the issue of these bonds and notes would be used for the purchase of the properties of Duquesne Gas Corporation and for the other corporate purposes of that corporation (R. 224, 183-8, 192-9).† The transactions hereinafter related were personally supervised by the defendant Maxime H. Furlaud (R. 81, 91, 71, 116). He was the president and chief stockholder of the dissolved corporation Furlaud & Company (R. 116, 110, 111).

Just prior to the issuance of the prospectuses, the defendants procured a fraudulent and highly excessive ap-

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†The relevant part of the prospectuses which are to this effect read as follows:

"SECURITY

The appraisals of the engineers covering the properties of the Corporation, including working capital of $365,000, aggregate $7,038,000 (R. 266).

* * * * * * * * * * * *

CAPITALIZATION

	Authorized	Outstanding
First Mortgage 6% Convertible Gold Bonds (this issue)	$4,000,000	$4,000,000
Convertible 6½% Secured Gold Notes	1,000,000	1,000,000
Common Stock (no par value)	1,250,000 Shs.	675,000 Shs. (R. 267)

* * * * * * * * * * * *

PURPOSE OF ISSUE

These bonds are issued by the Corporation in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes" (R. 270).

The note prospectus contained similar statements under similar captions (R. 277-284).

praisal stating a value of $7,038,000 for the natural gas properties (including $365,000 working capital) which the Duquesne Gas Corporation was organized to acquire and operate (R. 219-20, 224). The most improper methods pursued by the promoters in obtaining this appraisal are set out in the opinion of the District Court (R. 219, 220). Illustrative of this is the fact that the witness Nuss, who was one of the vendors and an expert oil and gas man familiar with such properties in the district and with fair market values, in addition to the property which he sold made a pure gift to the corporation of a contingent royalty lease on an undeveloped tract of 14,000 acres. This was included in this fraudulent appraisal at $840,000 (R. 61). It was through the use of this fraudulent appraisal that the defendants were able to consummate their fraud upon the Duquesne Gas Corporation and its creditors, the subscribers to the bonds and notes.

It was also found by the District Court that these properties, which cost $2,572,989 (Ptfs. Ex. 11, R. 170A) or about one-third of the amount of the fraudulent appraisal, were paid for out of the proceeds of the bonds and notes, out of the proceeds of which also came the $365,000 of working capital. That was all that the corporation ever received,—and all that its promoters ever intended it should receive,—out of the proceeds of the bonds and notes or for its stock (R. 224, 84).

Thus, while these defendants through their banking house received $4,492,768.73 from the sale of the bonds and notes (R. 95) they turned over to the Duquesne Gas Corporation or used for its benefit only the sum of $2,937,-989.90 (R. 78). They misappropriated and converted to their own use the difference, viz. $1,554,788.83 (R. 224). This sum, with interest, amounted to the sum of $1,834,-

640.08, which is the amount of the judgment granted (R. 233, 234).

The corporation at its start had, therefore, an outstanding indebtedness of $5,000,000 represented by $4,000,000 of bonds and $1,000,000 of notes against which it had $2,937,989 of assets consisting of gas properties which cost $2,572,989 and cash working capital of $365,000. Its assets were therefore but 59% of its liabilities. *It was thus insolvent at its very start.*

The defendants accomplished this fraud in the manner now briefly related.

The public offering of the $4,000,000 of bonds was made by the defendants on March 25, 1930 (R. 180). When about 75 or 80 per cent. of the bonds had been subscribed and the distribution of the bonds was an assured success (R. 76), a closing was arranged to be held at the Central Hanover Bank and Trust Company in New York on April 9, 1930.

Before arranging for the closing, the defendants had paid to the several vendors comparatively small sums aggregating a total of $45,510 (R. 170A) to make binding the options which until then were gratuitous. Preparations for the closing were then made so as to have the muniments of title of the various gas properties which were to be acquired by the corporation executed and lodged in escrow in various banks in or near Pittsburgh, with provisions that sight drafts covering the purchase prices of the several properties would be lodged in correspondent banks in New York and that, upon the acceptance of such drafts covering the purchase prices of the several optioned properties, the title deeds, which ran direct to Duquesne Gas Corporation, would be delivered to the representatives of the promoters (R. 81-82).

It was also arranged by the defendants that the subscribers to the bonds, consisting of about thirty distributing houses situated all over the United States, should have bank messengers at the closing to take the bonds for which they had subscribed against payment by certified check (R. 74, 82, 91).

This plan went off according to schedule.

Defendant Furlaud arranged with the Central Hanover Bank and Trust Company for a one day loan, upon the security of the bonds and notes all of which were physically present at the closing. As testified by the bank's officer Osborne "The bank always had a string on the money" (R. 91). Telegraphic assurances were then sent of the acceptances of the sight drafts (R. 81). The mortgages securing the bonds and notes which had been executed were in the hands of the promoters' representatives in Pennsylvania and were thereupon immediately recorded along with the instruments of conveyance which were released from escrow by the Pennsylvania banks pursuant to the telegraphic notice of the acceptance of the drafts (R. 82). The certified checks which were received in payment of the subscriptions of the purchasers of the bonds were thereupon taken and the bonds delivered to the purchasers. A large queue of bank messengers was present and was kept waiting until about the end of the closing which occupied the larger part of the day (R. 72, 82, 91). The money thus received from the bondholders was immediately applied toward the liquidation of the one day loan (R. 91).

These transactions at the closing were related by three witnesses who attended at the closing, namely: Krog, a former employe of the defendants, whom the defendants made vice-president of Duquesne Gas Corporation for the purpose of signing the bonds and notes and the other cor-

porate records prepared by the defendants (R. 71, 72); Duke, who was the defendants' attorney in charge of the proceedings at the closing (R. 81-84); and Osborne, who was the officer of the Central Hanover Bank and Trust Company representing the bank at the closing (R. 91). There is no evidence to controvert their testimony.

The balance of the bonds, the entire million dollars of notes and 675,000 shares of the capital stock, were appropriated by defendants at the closing without the payment of any consideration (R. 82, 83, 84). The balance of the bonds were soon sold (R. 95, 129).

A few weeks after the successful flotation of the $4,000,000 of bonds, the notes were sold by the defendants for $861,097.69 in cash (R. 189, 75, 95, 223).

Since the defendants had received as the proceeds of the bond issue the net sum of $3,631,671.04 (R. 95, 223) and had misappropriated for their own use from such proceeds all but the purchase price of the properties which was $2,572,989 (R. 170A) and the working capital which was $365,000 (R. 84), namely, they had then misappropriated $693,682.04, *the sole purpose of the issuance of the notes was merely for the defendants to misappropriate the whole proceeds thereof which amounted to $861,097.69.*

This made the total misappropriation by the defendants of the proceeds of the bonds and notes $1,554,779.73, above mentioned.

Of the 675,000 shares of the capital stock of the corporation which the defendants appropriated 85,000 shares were soon after sold through two dummy corporations, the defendants Byron Corporation and Chaucer Corporation, for the sum of $850,000 cash. This sale was made as an outright sale to a stock operator named Bergen (R. 96, 200, 201.). There was no proof as to what the defendants did with the remaining 590,000 shares of the capital stock. The

denial by the District Court of the plaintiff's claim that defendants were also accountable for this sum of $850,000 constituted the basis of the plaintiff's cross-appeal to the Court of Appeals.

The Fictitious Corporate Records

After the taking of the corporate proceedings which were had immediately before the closing to increase the capital stock from 1,000 shares to 1,250,000 shares, to authorize and approve the form of the $4,000,000 bond issue and the form of the mortgage securing the bonds and the $1,000,000 note issue and the form of the note indenture (R. 205-210, 211-217), a straightforward record of the actual transactions would have been a simple one. Since the purchase price of the gas properties, which cost $2,572,989 plus the $365,000 of working capital, was to be financed out of the proceeds of the $4,000,000 bond issue, and the balance of the proceeds of the bond issue amounting to nearly $700,000 and the whole proceeds of the $1,000,000 note issue and the whole proceeds of the issued 675,000 shares of stock, were to be appropriated by the promoters, this could have been recorded in a straightforward one page corporate resolution to that effect.

But such a record would for the purposes of the promoters have made too clear the nature of the transactions, so they chose instead to attempt to camouflage the facts through the use of an elaborate and confusing set of corporate proceedings containing five large volumes of minutes of the Duquesne Gas Corporation (R. 199) besides endless legerdemain recorded on the books of their dummy corporation Kingston Corporation and the four other dummy corporations euphoniously called Byron Corporation, Chaucer Corporation, Virgil Corporation and Kipling Corporation (R. 109-112, 200, 201, 203).

After recording the authorization, etc., of the increase of the capital stock and the making of the bond issue and of the note issue, they then recorded a so-called "Reorganization Agreement" dated April 7, 1930 between Duquesne Gas Corporation and Kingston Corporation which in effect purported to provide that Kingston Corporation was to turn over to Duquesne Gas Corporation the gas properties in consideration of $3,015,000 cash, $1,300,000 in face amount of Duquesne bonds and 535,000 shares of Duquesne stock (R. 201-203). They also recorded at the same time the making by Furlaud & Company, Inc. to Duquesne Gas Corporation and the acceptance by the latter of an offer to purchase $2,700,000 of bonds at 90, $1,000,000 of notes at 88, and 139,000 shares of stock at 50c a share, making a total of $3,379,500 (R. 206-207, 209-210).

At the closing, which was held at the Central Hanover Bank and Trust Company two days after the day of the record of these corporate proceedings, they went through the following forms: Maxime H. Furlaud arranged for the opening of two so-called one day credits, one running to Kingston Corporation in the amount of $3,015,000 and the other running to Furlaud & Company, Inc. in the amount of $3,379,500 (R. 91, 117, 119). These so-called one day credits were liquidated on that day and there was not a moment when the bank did not have a string upon the money (R. 91). They then on that day had Furlaud & Company, Inc. go through the form of delivering a check to Duquesne for the $3,379,500 and at the same moment had Duquesne deliver a check to Kingston Corporation for $3,015,000 (R. 78, 200). The difference of $364,500, together with the $500 which had been previously subscribed by the promoters for the 1,000 original shares, made the $365,000 of working capital which was left in the Duquesne treasury (R. 78).

The drafts which were taken up at that time covering the balance of the purchase price then payable under the escrow agreements, amounting to $2,449,900 (R. 84) were charged to the one day credit opened as above stated in the name of Kingston Corporation (R. 81). But this credit was immediately liquidated in full by the passing from Duquesne to Kingston of the $3,015,000 check, so that there was left a net balance to the credit of Kingston in the amount of $565,100 (R. 176). This $565,100 just fell off the table and into the pockets of Furlaud & Company, Inc. for on that day Kingston Corporation passed two checks to Furlaud & Company, Inc. aggregating $565,100 (R. 117).

The Distributing Group letter which Furlaud & Company, Inc. had already sent out under date of March 19th stated that it had purchased the whole $4,000,000 bond issue (R. 178). The way they recorded the transaction was that Furlaud had purchased $2,700,000 of the bond issue (R. 209-210) and that Kingston had acquired the other $1,300,000 (R. 201-203). The record which they made showed that this $1,300,000 of bonds remained in the Kingston Corporation until June 4th when it was made the subject of a so-called "dividend in kind" (R. 100), and this notwithstanding the fact that long before June 4th substantially the whole $4,000,000 had been issued and sold to innocent subscribers. The record also showed that Furlaud & Company, Inc. had purchased the $2,700,000 of bonds at 90, $1,000,000 of notes at 88 and 139,000 shares of stock at 50c a share, making an aggregate purchase price of $3,379,500 (R. 206-207, 209-210), which was pure fiction.

If Furlaud & Company, Inc. could be said to have purchased these securities at all, the purchase price was $3,379,500, less $565,100 which they received back on the

same day, or an aggregate purchase price of $2,814,400. If, as they claim, they purchased $2,700,000 of bonds at 90 or for $2,430,000, there was left of the total purchase price of $2,814,000 but $384,400 as the purchase price of the notes and stock. But they had the corporate minutes recite that they were purchasing the $1,000,000 of notes at 88 or $880,000, and the 139,000 shares of stock at 50c a share. The various corporate records which they created are not only inconsistent with the irrefutable facts but are inconsistent with one another.

It is, of course, manifest that the $3,015,000 figure written into the so-called "Reorganization Agreement" and the $3,379,500 figure written into the so-called Furlaud purchase of securities were purely arbitrary figures chosen because when subtracting one from the other a difference of $364,500 remained which as above stated produced, together with the $500 theretofore subscribed by the original incorporators, the specified working capital of $365,000 (R. 78). Any arbitrary figures which produced a difference of $364,500 would have served as well.

The further records they made in respect to the handling of the stock emphasize the fictitious character of the transactions. As above stated, they recorded the acquisition by Kingston Corporation of 535,000 shares of stock and by Furlaud & Company, Inc. of 139,000 shares of stock, which together with the 1,000 shares of stock which they recorded as subscribed for by the original incorporators made the total 675,000 shares of issued stock. As a matter of fact, the whole 675,000 shares of stock, when issued, were placed in the name of one Parisette who was an employee of Furlaud & Company, Inc. and bore a sort of *caveat* stamp that the shares could not be transferred without the consent of Furlaud (R. 91-92).

They then drew the Byron Corporation and the Chaucer Corporation into the recording of the stock transactions by recording on the minutes of these corporations that in one case the wife of Carlos Reuter (R. 101) and in another case an employee of Furlaud's (R. 102) had acquired valuable options for the purchase of some of this stock from Kingston Corporation which these optionees were willing to turn over to the Byron Corporation and Chaucer Corporation, respectively, and that the Byron Corporation and Chaucer Corporation were to exercise these options and give their promissory notes for the purchase price at 50c a share (R. 101, 102).

They then entered into an agreement with one J. J. Bergen, a stock operator, making the agreement in the name of Byron Corporation and Chaucer Corporation, for the sale of 85,000 shares at $10 a share, making an aggregate purchase price of $850,000 for the joint and equal account of these two dummy corporations to the extent of $425,000 each (R. 95-97, 100).

The dummy Virgil Corporation and Kipling Corporation were drawn into the records apparently for no other purpose than to put some nic[illegible]wists and turns in the trail (R. 105, 106, 109).

We submit that these devious and fictitious corporate records cannot alter the indisputable facts as to the realities of the situation, but serve merely to emphasize and aggravate the fraudulent character of the whole transaction.

The Treatment of the Facts by the Court of Appeals

Judge Manton's opinion, seemingly, looks at the fictitious corporate records and overlooks the actual transactions which transpired at the closing and the Court of Appeals thus falls into a vital error in stating that, at the time of the closing, the defendants "owned all of the issued com-

mon capital stock of the Duquesne Gas Corporation and all of its bonds and notes" (R. 268). The opinion is itself inconsistent with the foregoing quoted statement, for it says that on the day of the closing the purchasers of the bonds, to the extent of about $2,350,000 in face amount, paid at the closing by certified check amounts, aggregating $1,886,330 (R. 266). It appears, therefore, from the Court of Appeals' opinion that bondholders, other than the defendants, to the extent of at least $2,350,000 in face amount had become such at the time of the closing and had then paid at least $1,886,330 which was used to pay for the gas properties.

The only fact as to which there could be said to be conflicting testimony was as to the amount paid in at the closing by the innocent subscribers to the bonds. The plaintiff's proof showed that at the time of the closing the $4,000,000 bond issue had been subscribed to the extent of about 75 or 80 per cent. (R. 76), which, since the price was 96½ (R. 119), would go to show that about $3,000,000 was paid in at the closing. The opinion of the District Judge so finds (R. 223). The defendants' sole witness Halporn mentioned the above figures referred to in the opinion of the Court of Appeals, but admitted (R. 119) that this was of uncertain accuracy.

Even if the testimony of Halporn were believed, the conclusion that the defendants owned all of the bonds at the time of the closing is wholly unwarranted. It is conceded by all that at least $2,350,000 in face amount of bonds had been subscribed for prior to that time and that at least $1,886,330 was then paid in by the subscribers.

The bonds could not have been issued by the Duquesne Gas Corporation until the day of the closing. This is so for the simple reason that the corporate property was not conveyed to the corporation or the mortgage securing the

bonds recorded until that date, at which instant a very large amount of the bonds were delivered to the various innocent subscribers against payment by them in cash. These moneys were used to pay for the corporate properties in order thus to procure the conveyances to the corporation. This procedure required that the whole transaction be part of a simultaneous closing (R. 81-85). There is not the slightest room for the conception, therefore, that the defendants ever owned, even for a moment, the bonds which were delivered to and paid for by the innocent subscribers at the time of the closing.

The Court of Appeals (R. 266, 7) seems to attach importance to the fact that on the day of the closing Furlaud & Company, Inc. had also negotiated loans with three other banks aggregating $1,500,000. It is a fact that the defendants' witness Halporn testified to that effect, and that these loans were secured by the bonds, notes and stock of Duquesne Gas Corporation (R. 114). To what extent recourse was had to these loans at the time of the closing depends upon how much the bondholders paid in at the closing, which Halporn testified was $1,886,330 (R. 128). This sum was more than two-thirds of all that was required at the closing to pay for the corporate properties and to furnish the stipulated working capital.*

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*Amount used at the closing to pay for the corporate properties and to furnish the stipulated working capital (Testimony of Duke (R. 84)):

For the properties	$2,449,900
For working capital	364,500
	$2,814,400
Amount received at the closing from the innocent bond subscribers (Testimony of Halporn (R. 128))	1,886,330
Balance required for the closing	$ 928,070

As shown by the findings of the Trial Court (R. 223), the Court did not regard Halporn's testimony as credible in all respects, especially his minimizing version as to the extent to which these various loans were liquidated at the closing through the use of the moneys then furnished by the innocent bond subscribers. What amount, if any, may have been required to be furnished by the other three banks in order to carry out the closing was at best an arrangement lasting but for a few days for the reason that bond subscriptions continued to come in daily (R. 129), so that the balance required must have soon been made up from that source. Since their loans were upon the security of the

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The following is an analysis of the Furlaud & Co., Inc. one day loan account at Central Hanover Bank:

Amount credited on April 9th to Furlaud & Company, Inc.'s account at Central Hanover Bank representing certified checks received from innocent bond subscribers (R. 128)	$1,886,330
Amount credited to Furlaud & Company, Inc.'s account at Central Hanover Bank which came around back on April 9th by way of Kingston Corporation (R. 117, 128)	565,100
Amount credited on April 9th to Furlaud & Company, Inc.'s account at Central Hanover Bank as the proceeds of loans from the three lending banks (R. 114)	1,500,000
	$3,951,430
Amount of one day loan to Furlaud & Company, Inc. by Central Hanover (R. 117)	3,379,500
Balance to credit of Furlaud & Company, Inc. on April 9th after the payment of the $3,379,500 one day loan	$ 571,930

This balance was immediately turned over to the accounts of Furlaud & Company, Inc. at the three lending banks (R. 118). Halporn testifies (R. 118) that this balance was $482,782.02. But clearly this was a misstatement. It is apparent that, after crediting against the loans of $1,500,000 of the three lending banks, the balance of $571,930, the moneys furnished for the purposes of the closing by the three lending banks, could not have exceeded the difference between $1,500,000 and $571,930, which makes the above figure of $928,070.

bonds, notes and stock of this insolvent corporation (R. 114), these banks too must have been deceived and innocent parties.

But not to make too fine a point of it, it is entirely sufficient for the purposes of this case that the defendants conceded that the innocent bond subscribers had furnished at least $1,886,330 at the closing to this insolvent corporation and that this money was used by the promoters in acquiring the corporate properties direct from the original owners. In no possible view of the facts were the promoters as stated by the Court of Appeals alone upon both sides of the bargain.

The Appellate Court, although stating the facts quite differently from the findings of the Trial Court, nevertheless made no attempt to demonstrate that any finding was erroneous. Nor could such a demonstration have been made, for the reason that the undisputed evidence (except as to the amount paid in by the bondholders at the closing) compelled the findings which were made by the Trial Court. The Appellate Court reversed upon a false hypothesis.

The error of the Court of Appeals arises chiefly from its misstating a vital fact, viz.: that at the time of the closing the defendants "owned all of the issued Common capital stock of the Duquesne Gas Corporation and all of its bonds and notes," and then proceeding upon the theory that, under this view of the facts, the judgment should be reversed upon the authority of the decision of the United States Supreme Court in *Old Dominion Copper Company* v. *Lewisohn*, 210 U. S. 206, 52 L. Ed. 1025 (1908). The Court of Appeals did not refer to or discuss the decision of the United States Supreme Court in *Davis* v. *Las Ovas*, 227 U. S. 80, 57 L. Ed. 426 (1912).

SPECIFICATION OF ERRORS—SUMMARY OF ARGUMENT

1. The Court of Appeals erred in disregarding the findings of the District Court, which were based upon clear, ample and undisputed testimony, and in basing its reversal upon a false hypothesis as to vital facts.

2. The Court of Appeals erred in not holding that the defendants stood in a fiduciary relation to the corporation and that they were accountable to the corporation as fiduciaries for the proceeds coming into their hands from all of the securities of the corporation.

3. The Court of Appeals erred in not holding that the statements which defendant Furlaud caused to be inserted in both the bond and note prospectuses constituted such representations as to the purposes for which the proceeds thereof were to be used as to impress a trust upon such proceeds for the benefit of the corporation.

4. The Court of Appeals erred in not holding that, since the corporation was, by the fraudulent acts of the defendants, rendered insolvent at its start, the plaintiff in his capacity as receiver standing in the right of the creditors had the right to disaffirm the acts of the corporation.

5. The Court of Appeals erred in not holding that the corporation was powerless to render itself insolvent by surrendering to the defendants its right to hold them accountable to it for the proceeds which came into the hands of the defendants from the issuance of the securities of the corporation.

6. The Court of Appeals erred in not holding that in the hands of the defendants all of the securities issued to them were void under the Pennsylvania Constitution, and that the defendants at no time were in the position of stockholders, bondholders or noteholders of the corporation.

7. Since the defendant Furlaud was himself a promoter of the corporation, and since he individually supervised and conducted the transactions and caused the corporation Furlaud & Company, which he dominated, to make the wrongful appropriations and breach of trust, and thereafter caused Furlaud & Company to be dissolved, the Court of Appeals erred in not holding that he was individually accountable and liable for the wrongful appropriation and breach of trust.

8. The Court of Appeals erred in reversing the decree of the District Court.

9. The Court of Appeals erred in failing to modify the decree and increase the amount of the judgment as against defendants Furlaud and Kingston Corporation by adding $850,000 with interest, and by also granting judgment against each of the defendants Byron Corporation and Chaucer Corporation in the amount of $425,000 with interest.

POINT I

PRESUMPTIVELY THE TRIAL COURT'S FINDINGS WERE CORRECT. THE PRESUMPTION OF THE CORRECTNESS OF THESE FINDINGS SHOULD BE ENTERTAINED IN THIS COURT NOTWITHSTANDING THE REVERSAL BY THE COURT OF APPEALS.

The Court of Appeals did not review any of the findings of the District Court, set out carefully in the opinion of the District Court, or make any analysis or examination relating to any of them, or specifically reverse any of them; indeed, except as to one detail, none of the findings could have been, upon a true analysis of the testimony, in any way altered, for the reason that the findings were supported by clear, ample and undisputed testimony.

That one detail concerns the amount of bonds delivered and paid for at the closing by innocent subscribers. The defendants' version of the facts was that $2,350,000 in face amount of the bonds were thus delivered against payment of $1,886,330. The plaintiff's version is that a larger amount of bonds was delivered and paid for. The Trial Court found that about 75% or 80% of the issue had been subscribed for at the time of the closing and about $3,000,000 paid in by the innocent subscribers. This finding was supported by evidence.

Presumptively, the trial court's findings were correct. *Kimberly* v. *Arms,* 129 U. S. 512, 524; 32 L. ed. 764, 769, (1889); *Brookheim* v. *Greenbaum,* 225 Fed. 763, (C. C. A. 2nd 1915); *Dunn* v. *Trefry,* 260 Fed. 147, (C. C. A. 1st 1919); *Benedict* v. *Setters,* 261 Fed. 492, (C. C. A. 8th 1919); *Lackner* v. *McKechney,* 2 Fed. (2d) 516, (C. C. A. 7th 1924); cert. denied 267 U. S. 601, 69 L. Ed. 808; *United States* v. *Mammoth Oil Co.,* 14 Fed. (2d) 705, (C. C. A. 8th 1926); aff'd. 275 U. S. 13, 72 L. Ed. 137.

The presumption of the correctness of the trial court's findings should be entertained in this court notwithstanding this reversal by the Court of Appeals. *Mason* v. *U. S.,* 260 U. S. 545, 556; 67 L. Ed. 396, 400 (1923); *Adamson* v. *Gilliland,* 242 U. S. 350, 353; 61 L. Ed. 356, 358 (1917).

But even if the Appellate Court had seen fit upon a review of the evidence to reject the Trial Court's finding upon this fact and in place thereof to adopt the version of the defendants, nothing can justify the vital misstatement contained in the opinion of the Court of Appeals that at the time of the closing the defendants "owned all of the issued Common capital stock of the Duquesne Gas Corporation and all of its bonds and notes."

POINT II

THE DEFENDANT FURLAUD AS THE PROMOTER OF THE CORPORATION STOOD IN A FIDUCIARY RELATION TO IT SO AS TO BE ACCOUNTABLE FOR THE WHOLE PROCEEDS OF THE SECURITIES OF THE CORPORATION WHICH WERE DIVERTED AND MISAPPROPRIATED.

The Duquesne Gas Corporation was the creature of Furlaud. He caused the corporation to be organized. All of its capital stock was issued to one Parisette, his nominee, and the directors and officers were his nominees (R. 210, 211, 220).

As shown by the statement of facts, at the time of the closing of the transaction between the promoter and the corporation, about 75 or 80 percent of the $4,000,000 of bonds of the corporation were outstanding in the hands of innocent holders. The amount of their paid-in subscriptions thereto aggregated about $3,000,000. The balance of the whole $4,000,000 bond issue was then in the course of being subscribed to by innocent holders, and these additional subscriptions were soon after paid in full. In addition to this the promoter then contemplated an issue of $1,000,000 of notes which were soon after put into the hands of innocent purchasers, and for which the promoter received the additional sum of $861,097.69. Of the proceeds of these two issues, the promoter appropriated $1,554,779.73, and put into the corporation merely the gas properties, which cost $2,572,989, and $365,000 working capital, with the result that the corporation had at its start $2,937,989 of assets against a funded debt of $5,000,000. Its assets were, therefore, 59% of its liabilities, and it was insolvent at its creation.

As Judge KNOX puts it (R. 227):

> "At their (Furlaud's and Reuter's) behest and procurement, the gas corporation acted as it did. It was they who inflicted upon it the congenital injury that stunted its growth and circumscribed its life."

The mere fact that at the time of the closing the promoter had caused to be issued to his nominee all of the issued capital stock of the corporation did not, under these circumstances, permit the promoters to deal with the corporation as they pleased, and even to appropriate the proceeds of the corporation's securities to such an extent as to render it hopelessly insolvent.

It must be that under circumstances such as these the promoter is to be regarded as standing in a fiduciary relation to the corporation.

Yeiser v. *United States Board & Paper Co.*, 107 Fed. 340, 344 (C. C. A. 6th 1901). Judge SEVERENS says:

> "It is a well-settled principle of equity that those who participate in bringing about the organization of an incorporated company, and in getting it in condition for transacting the business for which it is organized, assume the obligations of a trust towards the company and those who shall be invited to come into the enterprise as stockholders and share in its fortunes."

New Sombrero Phosphate Co. v. *Erlanger*, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rep. 436 (1877). JESSEL M. R. says at L. R. 5 Ch. Div. 112:

> "Now, understanding, as I do, that the promoters of a company stand in a fiduciary relation to that company which is their creation; in this case that is emphatically so, for up to this time there was not really

> a single *bona fide* shareholder distinct from the promoters."

and on page 123:

> "* * * the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances."

The Supreme Court in *Davis* v. *Las Ovas*, 227 U. S. 80, 87, 57 L. Ed. 426, 430 (1913), commented upon these two decisions with approval and referred to "the well-considered opinion of Judge SEVERENS."

Perhaps the matter cannot be put more trenchantly than in the language of LORD MACNAGHTEN, writing for the House of Lords, and holding the promoters liable at the suit of a receiver in *Gluckstein* v. *Barnes* (1900), App. Cas. 240:

> "It is the old story. It has been done over and over again. * * * These gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view. They bring the company into existence by means of the usual machinery. They appoint themselves sole guardians and protectors of this creature of theirs, half-fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes. They issue a prospectus representing that they had agreed to purchase the property for a sum largely in excess of the amount which they had, in fact, to pay. On the faith of this prospectus they collect subscriptions from a confiding and credulous public. And then comes the last act. Secretly, and therefore dishonestly, they put into

their own pockets the difference between the real and the pretended price. After a brief career the company is ordered to be wound up."

But the Court of Appeals holds that this fraudulent promoter is entitled to immunity from liability or accountability under the authority of the decision of the United States Supreme Court in the case of *Old Dominion Copper Company* v. *Lewisohn,* 210 U. S. 206, 52 L. Ed. 1025 (1908).*

In this case the promoters, having acquired property with their own moneys, organized a corporation which took over their property in exchange for all of the securities of the corporation then issued, which consisted wholly of stock. Later they had the corporation sell a comparatively small number of shares to furnish working capital. These shares were sold at a substantially higher price than the cost to the promoters of the shares which had been issued

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*The litigation involving the liability of its promoters to Old Dominion Copper Company, of which the suit resulting in this decision is a part, had a remarkable history. It arose also in other suits dealing with the same subject matter in the Courts of Massachusetts and New Jersey, as well as in the suit entitled *Bigelow* v. *Old Dominion Copper Company,* which was decided in the Supreme Court in 1912, 225 U. S. 111, 56 L. Ed. 1009. In the Massachusetts case, the Supreme Court of that state declined to follow the decision of the Supreme Court of the United States but affirmed a final judgment holding the fellow promoter of Lewisohn accountable to the corporation for the whole secret profit, while the United States Supreme Court, in its decision in 225 U. S. above referred to, refused to require the Massachusetts Court to conform to the United States Supreme Court's decision in the *Lewisohn* case and the New Jersey Court refused to enjoin the Old Dominion Copper Company from continuing to pursue the co-promoter Bigelow in the Massachusetts Court in disregard of the United States Supreme Court's decision in the *Lewisohn* case.

For the convenience of the Court, we have set out in an appendix a brief history of this litigation with citation of the cases commenting upon it which have been since decided in the Federal and State Courts.

to them. The theory of the decision is, we submit, summed up in two sentences of the Court's opinion (210 U. S. 212):

> "At the time of the sale to the plaintiff, then, there was no wrong done to anyone. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land."

The case holds that owners of property may organize a corporation to take over their property on such terms as they please, provided that no one but they have an interest in the corporation, or, as the Court puts it, if they are on both sides of the bargain.

But in the instant case the defendants were not upon both sides of the bargain. At the moment of the consummation of the fraud upon this insolvent corporation these innocent and deceived bondholders were on the other side of the bargain.

In the case of *Davis* v. *Las Ovas, supra,* the Supreme Court's previous decision was distinguished and limited. In the *Davis* case the Supreme Court referred to the *Old Dominion* decision as follows (227 U. S. 86):

> "It is then said: 'If we admit, for the purposes of this point, that appellants did deceive some of the syndicate, what has the company to do with it? For this they cite *Old Dominion Copper Min. & Smelting Co.* v. *Lewisohn,* 210 U. S. 206, 52 L. ed. 1025, 28 Sup. Ct. Rep. 634, where it was held that a subordinate fraud practised by some of the promoters of a corporation upon some of their associates was a matter wholly between them and the syndicate, which gave rise to no corporate right of action in the absence of innocent incorporators or stockholders.'"
>
> "But that is not this case. Some of those, if not all, interested by appellants in the property and in its purchase for a proposed consideration were ignorant

of the real price which they were to pay for it, and were not, therefore, in complicity with their scheme to make a secret profit. These innocent members of the syndicate became stock subscribers and directors of the company, as did appellants. The buyers and sellers were not the same. Those of the syndicate assuming to act for the corporation in acquiring the property were under obligation to disclose the truth and deal openly. In the absence of such disclosure the corporate assent was obtained on false grounds. The wrong was done when those members of the syndicate not in complicity with appellants subscribed to the stock of the company and aided their guilty associate managers in the corporate action necessary to the corporate acquisition of the property at the exaggerated price placed upon it by those who were to realize a secret profit. Thus, the original fraud practised upon some of those associated with them in the promoters' arrangement became operative against the corporation itself. The standing of the corporation results from the fact that there were innocent and deceived members of the corporation when the property was taken over by it."

These two decisions of the Supreme Court when read together clearly establish that it is enough to make the promoters accountable to the corporation for their secret profit that other parties interested in the corporation did not share in the profit and were without knowledge of it; and that this result follows, even though the promoters had with their own moneys first acquired the property to be put into the corporation which was thereafter turned over at an exaggerated price.

It will be seen then how much stronger is the instant case for the application of such a rule. The corporate property was acquired by the corporation direct from its original owners. On any possible view of the facts, the moneys

of the innocent bondholders constituted at the very moment of the closing much the larger part of the moneys required for the full purchase price of the properties of the corporation and its working capital. Even if, according to the defendants' version of the facts, the innocent bondholders did not at the moment of the closing furnish all the money required for these purposes, it is undisputed that they furnished more than two-thirds of it and that their subscriptions were coming in daily and must within a matter of days have equalled all the capital the corporation ever had, or was intended by the promoters to have, and that soon these subscriptions greatly exceeded the amount required, which excess the promoters simply misappropriated. The corporation was put into being by the promoters with assets equaling but 59% of its liabilities. A stronger situation for applying the principles clearly laid down by the decision in *Davis* v. *Las Ovas* cannot well be imagined.

The Court of Appeals, nevertheless, entirely disregarded this court's *Davis* v. *Las Ovas* decision.

The defendants argued in the Court of Appeals that the decision of the case was governed by the *Old Dominion* case rather than by the *Davis* v. *Las Ovas* case, and that the fact that, at the time of the closing, the defendants, as they claimed, owned all of the capital stock of the corporation was enough to compel a judgment giving immunity to the defendants under the authority of the *Old Dominion* decision. They said it made no difference that there were innocent and deceived bondholders, and that this was so for the reason that bondholders or creditors should not be considered as members of the corporation so as to have the *Las Ovas* case govern the decision. The Court of Appeals on the other hand disposes of this subject by merely proceeding upon the erroneous hypothesis as to the

facts that the defendants were the owners not only of all of the stock, but of all the bonds and notes, as well.

For the argument that the existence of bondholders was of no importance, defendants cited as their chief authority the case of *Allenhurst Park Estates* v. *Smith,* 101 N. J. Eq. 581, 138 Atl. 709 (1927). But in that case it appeared that:

> "The complainant company is perfectly solvent and is not in the hands of a receiver" (138 Atl. 716).

The same is true of the other cases along this line cited by the defendants to the Court of Appeals.

On the other hand, there is authority indicating a different view. The case of *Johnson* v. *Louisville Trust Company,* 293 Fed. 857, 861 (C. C. A. 6th 1923), suggests that the existence of innocent prospective creditors is of some consequence.

There is much to be said for the view that creditors have an interest in the preservation of the corporate fund, even before depredations upon it have created insolvency. However this may be, it simply cannot be the law that the interest which the creditors have in preserving the corporate fund will be overlooked by the Courts when the corporation is rendered insolvent by the fraud perpetrated on it by its promoters. We have found no such decision in the books other than the decision of the Court of Appeals which is here for review, and we do not believe there is any such.

Certainly, in the case of an *insolvent* corporation, innocent creditors who have been injured by the promoters' fraud must be regarded as members of the corporation for the purposes of the *Las Ovas* decision. *In the instant case no one but the creditors furnished a cent of capital to the corporation. Who but they had any interest in this insolvent corporation?* In respect of an insolvent corpora-

tion, the interest of the creditors in the corporate fund is paramount. This is self evident and is shown clearly by the case of *Coleman* v. *Tepel*, 230 Fed. 63, 71 (C. C. A. 3rd 1916):

> "* * * when a stockholder, with the knowledge he has or with that with which he is charged concerning the financial condition of the corporation, engages in a transaction which results in a depletion for his advantage of corporate assets below the subscribed capital or below existing liabilities, as the law may be, and becomes a party to the solvent appearance of a business that is intended to be continued, he is bound by his act both to existing and future creditors, when its direct object or immediate consequence is the insolvency of the corporation and injury to creditors."

If the *Lewisohn* decision has the effect the Court of Appeals gives to it, a method is provided by which promoters may with impunity commit any fraud against the corporation, however flagrant and however much innocent parties whose interests then exist in the corporation may be made to suffer; for then this may be accomplished by the mere device of having the corporation, which can act only by the hands of its promoters, subscribe to a set of records fictitiously reciting that, at the time of the closing of the transaction between the promoters and the corporation, no one but the promoters had an interest in the corporation. This, we submit, is not the meaning of the *Lewisohn* decision.

As to the $850,000 received by the defendants as the proceeds of the sale by them of the shares of stock, although the District Court clearly felt that the whole transaction was most fraudulent, nevertheless that Court felt con-

strained by the Supreme Court's decision in the *Lewisohn* case to hold with the defendants as to this.

But in this the District Court fell into error in overlooking the fiduciary character of the relationship of the promoters to the corporation arising from the fact that at the time of the closing of the transaction innocent persons had a very large interest in the corporation.

The defendants should have been held accountable as fiduciaries for the proceeds of all the securities including the $850,000 which they received as the proceeds of the sale by them of a part of the stock as well as for the appropriation of a large part of the proceeds of the bonds and the whole proceeds of the notes.

POINT III

THE STATEMENTS CONTAINED IN THE BOND AND NOTE PROSPECTUSES WERE SUCH AS TO IMPRESS A TRUST UPON THE PROCEEDS OF THE ISSUE OF THE BONDS AND NOTES FOR THE BENEFIT OF THE CORPORATION.

What we have previously said as to the prospectuses plainly shows that they were intended to induce the belief in those whose subscriptions to the bonds and notes were solicited that the whole net proceeds of the bond and note issues was to be made available by the promoters to the corporation for the acquisition of the corporate properties and for working capital and other corporate purposes. No corporate bond or note is, of course, looked upon favorably unless there is some equity in the property beyond the amount of the funded debt. It is apparent that the whole prospectus was designed to convey the belief that the new corporation was set up with a real capital of over $7,000,000 and that, therefore, not only the whole net proceeds of the

bonds and notes but some very substantial amount representing the outstanding stock was to be made available to it.

The chiefly relevant parts of these prospectuses are quoted at the foot of page 4.

These prospectuses must be interpreted according to the impression which they convey rather than upon a too narrow and literal construction.

Downey v. *Finucane*, 205 N. Y. 251, 264 (1912):

> "Speaking of an equivocal prospectus which was condemned as fraudulent by the House of Lords in *Aaron's Reefs* v. *Twiss* (L. R. [App. Cas. 1896], 273, 285) Lord Halsbury calls the language ambidextrous; and this expression aptly characterizes that in the present case. In the case cited it was argued, as it is suggested here, that there was no specific allegation of fact which is proved to be false; but the lord chancellor protested against this being regarded as the true test and declared that the question was whether taking the whole thing together was there a false representation. 'I do not care by what means it is conveyed—by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue.'"

See also: *Gates* v. *Megargel*, 266 Fed. 811 (C. C. A. 2d 1920), citing *Ryan* v. *Ohmer*, 244 Fed. 31, 34 (C. C. A. 2d 1931); *Moran* v. *Standard Oil*, 211 N. Y. 187, 196 (1914).

No more need be said to demonstrate that these prospectuses were not designed to induce the belief in those

whose subscriptions for the bonds and notes were solicited that the proceeds of these issues were to a large extent to be misappropriated by the promoters and that the new corporation was actually to receive considerably less than $3,000,000 from the issuance of all of its securities and thus be hopelessly insolvent at its creation. On the contrary the bondholders and noteholders must have intended that the proceeds of their subscriptions were to be used for the benefit of the corporation, as the promoters, who had taken pains to induce that belief, well understood.

Where one delivers money to another with the intention that that other shall pay the money to a third person, a trust arises which may be enforced by that third person.

McKee v. *Lamon,* 159 U. S. 317, 322, 40 L. Ed. 165 (1917):

> *"There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by a bill in equity,* if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. *Taylor* v. *Benham,* 46 U. S. 5 How. 233, 274; *Kane* v. *Bloodgood,* 7 Johns. Ch. 110, 11 Am. Dec. 417; *Baring* v. *Dabney,* 86 U. S. 19 Wall. 1; *National Bank of Baltimore* v. *Connecticut Mut. L. Ins. Co.,* 104 U. S. 54; *Keller* v. *Ashford,* 133 U. S. 610; *Union Mut. L. Ins. Co.* v. *Hanford,* 143 U. S. 187; *Ryan* v. *Dox,* 34 N. Y. 307, 90 Am. Dec. 696; Story, Eq. Jur. §§1041, 1255; Mechem, Agency, §568. * * *
>
> "The objection that there was no consideration for the promise made by the appellant to adjust the claims of all parties, etc., is untenable since the original receipt of the money is a sufficient con-

sideration for all promises, expressed or implied, with reference to its final disposition. *Walker* v. *Rostron*, 9 Mees. & W. 411; Mechem, Agency, §568." (Italics ours.)

Sayer v. *Wynkoop*, 248 N. Y. 54 (1928), is to the same effect. The Court said at page 59:

> "* * * the intention of the owner, and not that of the receiver, is controlling upon the question whether title to the moneys has been transferred and a trust has been created."

From a broader view of it, the relationship of the defendants to the whole subject was such as to bring about an implied trust.

In 2 Story's Equity Jurisprudence (12th Ed.) §1255, we read:

> "One of the most common cases in which a court of equity acts upon the ground of implied trusts in invitum, is where a party has received money which he cannot conscientiously withhold from another party. It has been well remarked that the receiving of money, which consistently with conscience cannot be retained, is in equity sufficient to raise a trust in favor of the party for whom, or on whose account it was received. This is the governing principle in all such cases, and, therefore, whenever any interest arises, the true question is, not whether money has been received by a party, of which he could not have compelled the payment, but whether he can now, with a safe conscience, *ex aequo et bono*, retain it."

Under these authorities the moneys received by the bankers upon the sale of the bonds and the notes were impressed with a trust enforceable by the corporation.

Since the moneys which Furlaud's banking house received from the subscribers to the bonds and notes were

held subject to a trust for the benefit of the corporation, it is difficult to see how anything which the promoters could contrive to have this *insolvent* corporation do could destroy its property rights as the beneficiary of this trust fund.

This was the basis of the District Court's decision.

POINT IV

THE PLAINTIFF IN HIS CAPACITY AS RECEIVER AND STANDING IN THE RIGHT OF THE CREDITORS HAS THE RIGHT TO DISAFFIRM THE ACTS OF THE CORPORATION.

Even if the defendants had succeeded in so committing the corporation to an approval of the fraudulent acts of the defendants as to disentitle the corporation itself to any remedy,—which we do not believe to be the case,—it is nevertheless entirely clear that the receiver, standing in the right of the creditors, could disaffirm the acts of the corporation.

The accepted doctrine is that a receiver may disaffirm acts of the corporation or its officers which were in fraud of creditors even though there might be a good defense to the suit as against the corporation itself.

In *Casey* v. *Cavaroc,* 96 U. S. 467, 488, 24 L. Ed. 779, 788 (1877), the Court said:

(At p. 488)

> "* * * The receiver does not represent the bank alone; he represents all the parties. He represents the law, which takes charge of the property for the benefit of all creditors, according to their respective and mutual rights. * * *

(p. 489-490)

> "Indeed, it may be laid down as a general rule, as well at the common law as the civil law, that a

> trustee, assignee or syndic, having the powers and occupying the relations which are sustained by a receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a bona fide purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim."

In *Leach* v. *Grant,* 54 Fed. (2d) 731 (C. C. A. 6th 1932), at page 733, the Court in discussing certain defenses which clearly would have been good if urged against the corporation as a party, said:

> "But this is not, as the argument assumes, a suit on behalf of the corporation for the rescission or partial rescission of an ultra vires contract; it is a suit on behalf of creditors and stockholders to recover for a fraud. The receiver, it is true, has not tendered back to appellant what the Struthers Company received in the transaction. He is not in position to do so, and in that situation the court will not require him to do the impossible thing of making a tender, but will take notice of all the circumstances, and, if equity and justice require, will permit a recovery on the implied obligation of the appellant to return the property which it has no right to retain, or, failing to do so, to make compensation therefor in money." (Citing *Davis* v. *Las Ovas Co.*)

Following these principles, the rule has become firmly established that the receiver stands in the rights of the creditors and may undo all corporate transactions which

were in fraud of the creditors' rights even though the corporation itself might not be able to do so.*

Nothing more need be said to demonstrate the grievous fraud which was practiced upon the innocent creditors of this corporation which these promoters through their fraudulent misappropriations rendered hopelessly insolvent at the start.

A stronger situation for applying the well established doctrine that a receiver may disaffirm acts of the corporation which are in fraud of creditors cannot well be imagined.

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*See: **Fed.**—*Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 371, 28 S. Ct. 406, 52 L. Ed. 528; *Hamor v. Taylor-Rice Engineering Co.*, 84 Fed. 392, 399; *American Can Co.* v. *Erie Preserving Co.*, 171 Fed. 540, 542; *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. 456, 460; *Westinghouse El. Mfg. Co.* v. *Binghamton Ry. Co.*, 255 Fed 378, 385. **Conn.**—*Greene* v. *Sprague Mfg. Co.*, 52 Conn. 330, 361. **Ill.**—*Peabody* v. *New England Water Works Co.*, 184 Ill. 625, 56 N. E. 951. **Ind.**—*Voorhees* v. *Indianapolis Car & Mfg. Co.*, 140 Ind. 220, 39 N. E. 738, 744. **Ky.**—*Industrial Mut. Deposit Co.'s Rec'r.* v. *Taylor*, 118 Ky. 851, 82 S. W. 574, 575. **Mass.**—*Williams* v. *Old Colony Trust Co.*, 222 Mass. 378, 110 N. E. 1029. **Minn.**—*German American F. Corp.* v. *Merchants & M. S. Bank*, 177 Minn. 529, 225 N. W. 891, 649 L. R. A. 582, 586. **Mo.**—*Alexander* v. *Relfe*, 74 Mo. 495, 516. **Nebr.**—*Williams* v. *Turner*, 63 Nebr. 575, 88 N. W. 668. **N. J.**—*Bradley* v. *United Wireless Tel. Co.*, 79 N. J. Eq. 458, 459, 81 Atl. 1107; Aff'd 83 N. J. Eq. 688, 93 Atl. 1084. **N. C.**—*Latta* v. *Catawba Elec. & Power Co.*, 146 N. C. 285, 59 S. E. 1028. **N. Y.**—*Pittsburgh Carbon Co.* v. *McMillin*, 119 N. Y. 46, 53; 23 N. E. 530. **Ohio**—*Smith* v. *Johnson*, 57 Oh. St. 486, 489; 49 N. E. 693, 694. **Penna.**—*Lyons* v. *Benney*, 230 Pa. 117, 119; 79 Atl. 250. **R. I.**—*Hayes* v. *Kenyon*, 7 R. I. 136, 141. **Utah**—*United States* v. *Church*, 5 Utah 538, 540; 18 Pac. 35. **Wash.**—*Wirkkala* v. *Wirkkala Bros. Logging Co.*, 109 Wash. 137, 186 Pac. 315, 316. **Wisc.**—*Harrigan* v. *Gilchrist*, 121 Wis. 127, 99 N. W. 909, 937.

See also 14a C. J. 990; 23 R. C. L. 116.

POINT V

THE CORPORATION WAS POWERLESS TO RENDER ITSELF INSOLVENT BY SURRENDERING TO THE DEFENDANTS ITS RIGHT TO HOLD THEM ACCOUNTABLE TO IT FOR THE PROCEEDS WHICH CAME INTO THE HANDS OF THE DEFENDANTS FROM THE ISSUANCE OF THE SECURITIES OF THE CORPORATION.

The officers and directors of the corporation with the assent of its stockholders may as a general rule commit the corporation, but when the rights of creditors are involved there are limitations upon the power of the corporation to act. *Fletcher Cyclopedia of Corporations, Permanent Edition;* Section 7407, states the rule in the following language:

> "As a general rule, an insolvent corporation cannot transfer its assets to the prejudice of creditors even though the action is joint by all the officers and stockholders" (See cases there cited).

The corporation was the creature of the defendants. They could commit it to much, but they could not commit it to everything. They went too far when they sought to commit it to an arrangement by which the proceeds from the securities which came into the hands of the defendants in a fiduciary capacity to the corporation and to its creditors were misappropriated by the defendants to such an extent as to render the corporation hopelessly insolvent.

POINT VI

IN THE HANDS OF THE DEFENDANTS ALL THE SECURITIES WERE VOID UNDER THE PENNSYLVANIA CONSTITUTION. THE DEFENDANTS AT NO TIME WERE IN THE POSITION OF STOCKHOLDERS, BONDHOLDERS OR NOTEHOLDERS OF THE CORPORATION.

It is alleged in the complaint and admitted in the answers that the Duquesne Gas Corporation is a corporation organized and existing under the laws of the State of Pennsylvania.

Article 16, §7 of the Constitution of Pennsylvania provides as follows:

> "* * * no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." Pennsylvania Act of April 17, 1876 (P. L. 30) §4 to the same effect.

The case of *Commonwealth* v. *Reading Traction Co.*, 204 Pa. 151, 53 A. 755 (1902), holds that the issuance of bonds or stock of a corporation for inadequate consideration is void, although the position of the innocent holders of the securities will be protected.

Both the Pennsylvania and Federal courts have applied this Constitutional provision to render invalid fictitious issues of stocks and bonds where they were not held by innocent purchasers. *Guarantee T. & T. Co.* v. *Dilworth Coal Co.*, 235 Pa. 594 (1912); *Bingaman* v. *Commonwealth Trust Co.*, 15 Fed. (2d) 119 (D. C. M. D. Pa. 1926); *In re Wyoming Valley Ice Co.*, 153 Fed. 787 (D. C. M. D. Pa. 1907), aff'd *sub nom. Weigand* v. *Albert Lewis Lumber & Mfg. Co.*, 158 Fed. 608 (C. C. A. 3rd 1908). Furthermore, it is not a case where the corporation alone is interested in declaring the transaction illegal. The fictitious

issuing of corporate securities is a question of public policy. *Gearhart* v. *Standard Steel Co.*, 223 Pa. 385 (1909).

The Supreme Court of Pennsylvania discussing the purpose of this prohibition has said:

> "The constitutional and statutory provisions referred to were designed to prevent unscrupulous persons from fraudulently issuing and placing on the market bonds or stock not fairly representing money or property received by the corporation." *Big Springs Electric Co.* v. *Kitzmiller*, 268 Pa. 34, 38 (1920).

Even if these bonds could have been said to have been in the hands of the promoters even for an instant, they would be void in *their* hands, under the Pennsylvania Constitution and decisions. Since the notes and stock were issued to the promoters without any consideration whatsoever, they were in their hands void under the Pennsylvania Constitution and decisions. It will not do to say that the 1,000 shares for which a payment of $500 was recorded are in any different position than the rest of the 675,000 shares. This $500 transaction was a part of the whole scheme which was for the immediate withdrawal by the promoters of not only this $500 but of about $1,500,000 besides of the corporate fund furnished by the bondholders and noteholders. The promoters were, therefore, not members of the corporation as valid stockholders or in any other sense at the time of the closing of the transaction.

Big Springs Electric Co. v. *Kitzmiller*, 268 Pa. 34 (1920) and *Bole* v. *Murray*, 233 Pa. 589 (1912) are authority for the proposition that the defendants are accountable under the Pennsylvania Constitution for the difference between the face amount of the bonds and notes and the consideration received by the corporation. The judgment granted by the District Court could have been sustained upon this ground alone.

POINT VII

THE DEFENDANT FURLAUD IS PERSONALLY ACCOUNTABLE FOR THE FRAUDULENT MISAPPROPRIATIONS.

The individual Maxime H. Furlaud and his associate Reuter were the promoters of the corporation. They personally planned and carried out the whole transaction. This is made clear from the beginning to the end of the record. There is not a word anywhere in the record to the contrary. The findings of the District Court are to that effect (R. 219, 220, 222, 229, 231).

They used their corporation called Furlaud & Company Inc. as well as the several dummy corporations, for the purpose of recording the voluminous corporate records which they created. After the fraud had been consummated, they caused the corporation Furlaud & Company Inc. to change its name to Winchelsea Holding Corporation and then caused it to be dissolved (R. 109). It is entirely manifest that these corporations acted wholly under their personal dominion.

In spite of this, the opinion of the Court of Appeals erroneously states at page 267:

> "Maxime H. Furlaud had no relation to these transactions other than as an officer and director of Furlaud & Company Inc., and his personal activity in carrying on the negotiations and transactions. He did not participate in the alleged fraudulent appraisal or receive personally any of the moneys paid to Furlaud & Company Inc."

While it is true that his associate promoter Reuter had more directly to do with the arrangement for the fraudulent appraisal, certainly there is no exculpation for Furlaud in that. The record clearly does not justify the

statement that Furlaud did not receive personally any of the moneys paid to Furlaud & Company, Inc. It is a fact that the record does not disclose the precise transactions by which these moneys came into the individual hands of Furlaud and Reuter, but the undisputed evidence shows that Furlaud and Reuter and their respective wives owned all of the stock of Furlaud & Company, Furlaud being the chief owner (R. 110, 111). The fact that soon after the consummation of their fraud Furlaud and Reuter caused their corporation to be dissolved compels the conclusion that the money received by their corporation came into their hands.

As demonstrated in Point I, these incorrect or misleading statements contained in the opinion of the Court of Appeals cannot disturb the effect of the findings of the Trial Court.

One may not cause a corporation which he dominates to commit a breach of trust without himself becoming accountable for the consequences. The dissolution of the corporation under the camouflaged name was manifestly for the purpose of hindering or defeating the rights of Duquesne Gas Corporation and of its creditors. This was Furlaud's final step in carrying out his breach of trust and in perpetrating the whole fraudulent scheme.

Anderson v. *Daley*, 38 App. Div. 505 (1899) (Appeal dismissed 159 N. Y. 146) is exactly in point. In that case one George A. Jones was an officer and director of Devlin & Company, a business corporation. One Daley (a bookkeeper of the company who was also a stockholder, officer and director of the corporation), was trustee under the will of Albert Ward, and as such deposited the moneys of the Ward estate with the corporation. Devlin & Company became insolvent, Jones died, and the beneficiaries of the Ward estate brought action to charge the estate of George

A. Jones with liability for the balance due the Ward estate by the corporation. The Court said (p. 512):

> "It does, however, clearly establish that Jones was aware of the insolvent condition of the corporation, and he also had knowledge that moneys of the estate were being furnished by the trustee and used in the business of the corporation. He was an active participant in the use of such moneys. * * * the evidence is clearly sufficient to charge him with knowledge and participation in their use for the business of the corporation, and, therefore, for his own benefit; and this is sufficient to charge him with liability * * *. *Nor can he shield himself by the fact that in what he did he acted as an officer of the corporation. The corporation could only act through its officers, and it is not essential that the misuse of the trust funds should be for the exclusive benefit of the person making such unlawful use, or indeed any benefit at all. Where he possesses the knowledge of the misuse of the trust funds, and knowingly applies them either for his own benefit or for the benefit of another, his liability is complete as the injury to the estate is the same whether he do it as an officer or as an individual. The basis of his liability is knowledge and injury, both of which here exist.*" (Italics ours.)

In any aspect of the case, there can be no question of the personal liability of the defendant Furlaud, for he, himself, planned and carried out the organization of the corporation and was himself a promoter, and as such, severally liable with his co-promoters for the secret profit which they obtained. *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 132 (1911).

Having appropriated shares of stock as a part of his secret profit he may be compelled to account for the $850,000 proved to have been received from the sale of a part of

it (*Chandler* v. *Bacon,* 30 Fed. 538, 540, and cases cited therein), as well as for the diverted trust fund which arose from the sale of the bonds and notes.

Defendant Kingston Corporation having participated in all the transactions is also liable for the whole amount diverted. The defendants Byron Corporation and Chaucer Corporation having each acted as the recipients of $425,000 from the proceeds of the sale of 85,000 shares of the stock of Duquesne Gas Corporation for the sum of $850,000 are each liable in the amount of $425,000.

POINT VIII

THE FORM OF THE DECREE.

The facts adduced at the trial were sufficient to permit of the framing of a final decree fixing the liability of the accounting defendants. The precise amount of net proceeds which came into the hands of the accountable defendants from the proceeds of the bonds, notes and stock was proved. The precise amount which the corporation received therefrom was proved. The figures are as follows:

Final net proceeds from $4,000,000 bond issue	$3,631,671.04
Final net proceeds from $1,000,000 note issue	861,097.69
Proceeds from the sale of 85,000 shares of stock	850,000.00
	$5,342,768.73

Cost of properties including the nine option properties and the several leases of undeveloped territory and including operating adjustments during the option period	$2,572,989	
Working capital	365,000	2,937,989.00
Amount received by the defendants from the bonds, notes and stock and diverted and misappropriated to their own use..		$2,404,779.73

The District Court properly held that the defendants as defaulting trustees were not entitled to be credited for services and disbursements in the course of defrauding the beneficiary. *Commonwealth Finance Corporation* v. *McHarg*, 282 Fed. 560 (C. C. A. 2d, 1922); *Davis* v. *Las Ovas Co.*, 227 U. S. 80 (1912); *Dunlap* v. *Twin City Power Co.*, 226 Fed. 161 (C. C. A. 4th 1915).

It was clearly to the interest of the receivership estate to avoid the expense and delay which would result from the making of an interlocutory decree for an accounting and the proceedings thereafter before a master. This would have entailed the reattendance of the numerous witnesses who reside at distant places, which, manifestly, would have led to long-drawn-out and expensive proceedings.

CONCLUSION

The judgment of the United States Circuit Court of Appeals for the Second Circuit, filed March 11, 1935, should be reversed and the decree of the United States District Court for the Southern District of New York

filed the 11th day of May, 1933, should be modified by increasing the amount of the judgment against the defendants Furlaud and Kingston Corporation by the sum of $850,000 with interest and by awarding judgment against the defendant Byron Corporation for $425,000 with interest and against the defendant Chaucer Corporation for $425,000 with interest and the decree of the District Court as so modified should be affirmed.

Respectfully submitted,

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September, 1935

APPENDIX

THE DECISION IN *OLD DOMINION COPPER MINING AND SMELTING COMPANY v. LEWISOHN*, 210 U. S. 206 (1908), AND THE OTHER DECISIONS OF THE FEDERAL AND STATE COURTS SINCE THAT TIME DEALING WITH THE SUBJECT.

The litigation growing out of the promotion of the Old Dominion Copper Mining and Smelting Company took a varied course. The corporation itself (there was no receivership) brought two suits which, except as to the defendants named, were substantially identical. One was the suit instituted in the Federal Court in New York against Lewisohn, one of the alleged fraudulent promoters, which resulted in the determination by the Supreme Court in 210 U. S. 206. The other was a suit brought in the State courts of Massachusetts against Bigelow, who was Lewisohn's associate as promoter. The Supreme Court of the United States held that the corporation had no right of action against its promoters to recover for a secret profit, since they owned all the stock of the corporation at the time of the transaction and were thus on both sides of the bargain, even though it was contemplated at the time that others should become stockholders by original subscription without knowledge of the secret profit. The Supreme Court of the State of Massachusetts (203 Mass. 159) reached the directly opposite conclusion. In a suit brought in New Jersey seeking to enjoin the corporation from pursuing Bigelow, the Supreme Court of New Jersey (74 N. J. Eq. 457) took the view of the Massachusetts court; and the United States Supreme Court itself in a later decision, *Bigelow* v. *Old Dominion Copper Company*, 225 U. S. 111, 56 L. Ed. 1009 (1912) refused to require the

Massachusetts court to conform to the Supreme Court's decision. Thus while one of the joint promoters of the Old Dominion Company escaped liability in the Federal courts, his fellow promoter was finally held liable by the Massachusetts courts.

These suits and the several phases of them in the United States, Massachusetts and New Jersey courts are reported as follows:

188 Mass. 315 (1905);
203 Mass. 159 (1909);
74 N. J. Equity 457 (1908);
136 Fed. 915 (1905);
148 Fed. 1020 (1906);
210 U. S. 206 (1908);
225 U. S. 111, 56 L. Ed. 1009 (1912);
195 Fed. 637 (1911);
202 Fed. 178 (1913).

The two latest decisions above referred to in the Federal courts involved a continuation of the same action after amendments to the complaint had been made. A brief history of the several suits and decisions growing out of the transaction is given by Judge Hough in 195 Fed. 637 (1911). Although Judge Noyes in the Circuit Court of Appeals (202 Fed. 178) indicated that he thought the amended complaint stated a cause of action in spite of the previous decision of the Supreme Court of the United States, recovery was denied on principles of estoppel and *res adjudicata*. (Writ of Cert. denied, 229 U. S. 613 (1913).)

The precise point of difference between the Supreme Court and the Massachusetts Court is, we believe, this: The Massachusetts Court adhered to a distinction, which

had been developed in earlier decisions that, if, at the time of the closing of the transaction, the promoters contemplated that there would at a later time be innocent subscribers to the stock of the corporation, the corporation could require the promoters to account for their secret profits; but that, if the promoters took all of the capital stock, although they contemplated reselling part of it to innocent purchasers, the contrary result would follow. The Supreme Court held that such a distinction depended too much upon form and was not acceptable. It held that the promoters were not accountable to the corporation unless at the time of closing the transaction there were innocent members of the corporation.

The Supreme Court, nevertheless, took pains to limit its decision to the particular facts of that case, for they say at page 216:

> "When, as here, after it (the corporation) really exists, it consents, we at least shall require stronger equities than are shown by this bill to allow it to renew its claim at a later date because its internal constitution has changed.
>
> "* * * if we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which 13/15 of its stock were parties, for the benefit of the guilty, if there was guilt in anyone, and the innocent alike. We decide only what is necessary."

We do not believe there is a case in the books other than the decision now under review, where innocent and defrauded stockholders or bondholders furnished the money which was used to pay for the conveyance from

which the promoters derived their secret profit, in which the promoters have been able to obtain immunity on any theory. It does not matter what devices the promoters use or in what form they record the transaction. The above distinction which the Courts have made as to the form of the transaction does not under such circumstances apply. Cases to this effect are the well-considered cases of *California-Calaveras Mining Co.* v. *Walls,* 170 Cal. 285 (1915) and *Pittsburgh Mining Company* v. *Spooner,* 74 Wisc. 307 (1889).

The Supreme Court's *Lewisohn* decision, as the reasoning of the opinion clearly shows, has no application whatsoever to a situation in which, at the time of the closing, there were then others having a financial interest in the corporation who suffered from the promoter's secret profits. If there could otherwise be any doubt that the decision is thus limited, the matter is made perfectly clear by the decision in *Davis* v. *Las Ovas,* 227 U. S. 80 (1913). This case was decided at the same term as *Bigelow* v. *Old Dominion.* It is commented upon at pages 25-27 of the brief.

The Court in deciding *Davis* v. *Las Ovas* did not overrule the *Lewisohn* decision, but takes it as a case which was rightly decided on its own facts. But it may be noted that the Court held (227 U. S. 87) that "Neither is the corporate right of action defeated by the fact that the recovery will inure to the guilty as well as to the innocent, nor is the fact that all of the parties who may have shared in the secret profits are not sued fatal to the case;" also that the Court expressly approved the decisions in *Yeiser* v. *U. S. Board & Paper Co.* and *New Sombrero Phosphate Co.* v. *Erlanger,* which have generally been taken by the Courts in decisions both before and since the *Old Dominion*

cases as authority for a rule contrary to that of the *Lewisohn* decision.

In cases subsequently arising, the Federal courts generally have distinguished the *Lewisohn* case and applied the *Davis* v. *Las Ovas* case. The following are such cases:

In *Tilden* v. *Barber*, 268 Fed. 587 (D. C. N. J. 1920), the promoters were held liable to the corporation though they owned all the stock at the time of the transaction with the corporation. This result was reached on the theory that the promoters were in the position of trustees to subscribers who were to be future stockholders of the corporation. The court at page 598 quoted from *Yeiser* v. *U. S. Board & Paper Co.*

The Court of Appeals in the 6th Circuit again invoked this trust doctrine in *American Shipbuilding Co.* v. *Commonwealth S.S. Co.*, 215 Fed. 296 (C. C. A. 6th, 1914). It was there said that when the promoters commenced their negotiations for the organization of the company, they were acting as trustees for the future corporation and its stockholders.

The same result was reached in *Dunlap* v. *Twin City Power Co.*, 226 Fed. 161 (C. C. A. 4th, 1915).

In *Humble Oil Co.* v. *Campbell*, 69 Fed. (2d) 667 (C. C. A. 5th, 1934), which is the latest decision of the Federal courts upon the subject, the defendant issued and sold certificates of interest in certain oil properties owned by him and represented that all the proceeds would be turned over to the unit holders. In violation of the trust thus created the defendant sold a portion of the property and retained the proceeds. A corporation was organized to take over the property and the unit holders subsequently became shareholders in the corporation. In this suit by the receiver of the corporation it was contended that, under the doctrine of the *Lewisohn* case, no right of action existed

in favor of the receiver. But the court held that the defendant occupied a fiduciary relation to the unit holders and the future corporation, that where such a relationship exists the corporation may follow and gather in the trust property in spite of the rule of the *Lewisohn* case.

Such Federal cases as have applied the *Lewisohn* case in denying a recovery by the corporation, were, we believe, cases the decisions in which were ultimately based upon the fact that no fraud was actually practiced by the promoters. Those are the cases of *Ball* v. *Breed*, 294 Fed. 227, 231 (C. C. A. 2d, 1923); *South Penn Collieries Co.* v. *Sproul*, 52 Fed. (2d) 557, 561 (C. C. A. 3rd, 1931); *Johnson* v. *Louisville Trust Co.*, 293 Fed. 857, 861 (C. C. A. 6th, 1923).

The question involved in the *Old Dominion* cases has frequently arisen in the State Courts.

By 1905 a number of decisions had already set a strong precedent for holding the promoters fiduciaries and accountable to the corporation where the scheme contemplated the entry of innocent stockholders.

Fed.	*Yeiser* v. *U. S. Board & Paper Co.*, 107 Fed. 340 (C. C. A. 6th, 1901);
Mass.	*Hayward* v. *Leeson*, 176 Mass. 310 (1900);
Maine	*Land Company* v. *Lewis*, 101 Me. 78 (1905);
Penn.	*Bailey* v. *Pittsburgh etc. Co.*, 69 Pa. 334 (1871);
Wisc.	*Pittsburgh Mining Co.* v. *Spooner*, 74 Wisc. 307 (1889);
	Pietsch v. *Milbrath*, 123 Wisc. 647 (1905).

See also:

Fed.	*Chandler* v. *Bacon* (C. C. 1887), 30 Fed. 538;
	Cortes C. v. *Thannhauser* (C. C. 1891), 45 Fed. 730;

Cal. *Burbank* v. *Dennis*, 101 Cal. 90 (1894);
Ct. *Yale Gas Stove Co.* v. *Wilcox*, 64 Ct. 101 (1894);
Mo. *Land Co.* v. *Case*, 104 Mo. 572 (1891);
N. Y. *Brewster* v. *Hatch*, 122 N. Y. 349 (1890);
Penna. *Densmore Oil Company* v. *Densmore*, 64 Pa. 43 (1870);
Wisc. *Hebgen* v. *Koeffler*, 97 Wisc. 313 (1897).

Such has long been the rule in the English Courts:

New Sombrero Phosphate Co. v. *Erlanger*, L. R. 5 Ch. Div. 73, 46 L. J. Ch. N. S. 425, 36 L. T. N. S. 222, 25 Week. Rp. 436 (opinion of Jessel, *M.R.*) (1877);
Gluckstein v. *Barnes* (1900), App. Cas. 240 (opinion of Lord Macnaghten);
In re Leeds & Hanley Theatres, Ltd. (1902) L. R. C. D. 809.

Since the *Old Dominion* decisions the State Courts have often discussed the conflict between the Massachusetts decision in the *Bigelow* case and the United States Supreme Court decision in the *Lewisohn* case, and in that connection the *Davis* v. *Las Ovas* decision. In the following cases, the Courts have shown disagreement with *Old Dominion* v. *Lewisohn*.

Calif. *California Mining Co.* v. *Walls*, 170 Calif. 285 (1915);
Ken. *Datillo* v. *Roaten Creek Oil Co.*, 222 Ky. 378 (1927);
Mich. *Torrey* v. *Toledo Portland Cement Co.*, 158 Mich. 348 (1909);
American Forging Co. v. *Wiley*, 206 Mich. 664 (1919);
Neb. *Nebraska Mausoleum Co.* v. *Matters*, 108 Nebr. 618 (1922);

N. J. *Arnold* v. *Searing,* 78 N. J. Eq. 146 (1910); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.,* 74 N. J. Eq. 457 (1908);
N. C. *Goodman* v. *White,* 174 N. C. 399 (1917);
Ore. *Wills* v. *Nehalem Coal Co.,* 52 Ore. 70 (1908); *Rugger* v. *Mt. Hood Electric Co.,* 143 Ore. 193 (1933);
R. I. *Anderson* v. *Johnson,* 45 R. I. 17 (1923);
S. D. *Meier* v. *Eaton,* 46 S. D. 286 (1923).

See also:

Ariz. *Frame* v. *Mahoney,* 21 Ariz. 282 (1920);
Fla. *McNabb* v. *Tampa etc. Land Co.,* 78 Fla. 149 (1919); but *cf. Lake Mabel Development Co.* v. *Bird,* 99 Fla. 253 (1930);
Ga. *Downey* v. *Bird,* 171 Ga. 532 (1930);
Me. *Mason* v. *Carothers,* 105 Me. 392, 74 Atl. 1030 (1919);
N. J. *Allenhurst Park Estate* v. *Smith,* 101 N. J. Eq. 581, 138 Atl. 709 (1927).

And see note to *Davis* v. *Las Ovas* in 57 L. Ed. 426 and in 85 A. L. R. 1276-89; also *Ballantine Private Corporations* § 50.

Only a few of the states have indicated a preference for the *Lewisohn* decision.

See:

Colo. *Lilylands Canal Co.* v. *Wood,* 56 Colo. 130 (1913);
Minn. *Hoffman Motor Truck Co.* v. *Erickson,* 124 Minn. 279 (1914);
Wash. *Inland Nursery & Floral Co.* v. *Rice,* 57 Wash. 67 (1910);
W. Va. *Vasey* v. *Coal Co.,* 89 W. Va. 499 (1921).

But it may be pointed out that in those jurisdictions which have followed the rule of the *Lewisohn* case, the courts have recognized that, where the rights of creditors are involved, the result may be different. See particularly:

Hoffman Motor Truck Co. v. *Erickson*, 124 Minn. 279 (1914);

Inland Nursery & Floral Co. v. *Rice*, 57 Wash. 67 (1910);

Vasey v. *Coal Co.*, 89 W. Va. 499 (1921);

Johnson v. *Louisville Trust Co.*, 293 Fed. 857, 861 (C. C. A. 6th, 1923).